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Dayton Newspapers, Inc., d/b/a Cox Ohio Publishing and Dayton Newspaper Guild, Local 34157, The Newspaper Guild—Communications Workers of America. Case 9–CA–44559

June 5, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

Upon a charge filed by Dayton Newspaper Guild, Local 34157, The Newspaper Guild—Communications Workers of America (the Union) on August 20, 2008, against Dayton Newspapers, Inc., d/b/a Cox Ohio Publishing (the Respondent), the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing and refusing to increase the mileage reimbursement rate for unit employees from 29 cents per mile to 32 cents per mile.

On December 30, 2008, the General Counsel, the Respondent, and the Union filed a Joint Motion and Stipulation of Facts to transfer the proceeding to the Board. The parties agreed that the charge, the complaint, the answer, the stipulation of facts, the statement of issues presented, and each party's statement of position constitute the entire record in the case. The parties waived a hearing before an administrative law judge, and the issuance of an administrative law judge's decision, and submitted the case directly to the Board for findings of fact, conclusions of law, and a decision and order. On February 9, 2009, the Board approved the stipulation and transferred the proceeding to the Board for issuance of a decision and order. Thereafter, the General Counsel, the Union, and the Respondent filed briefs.

On the entire record and the briefs, the National Labor Relations Board¹ makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Dayton, Ohio, has been engaged in the publishing and distribution of daily newspapers. During the 12-month period preceding the issuance of the complaint, the Respondent derived revenues in excess of \$200,000, and has subscribed to various interstate news services, published various nationally syndicated features, and advertised various nationally sold products.

The parties stipulated, and we find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

The most recent collective-bargaining agreement between the Union and the Respondent expired by its terms on January 7, 1989. On January 1, 2008,² after the parties reached an impasse in bargaining for a new agreement, the Respondent implemented its "last, best, and final offer" containing, among other things, the following provision (Article 4.01):

Article 4: General Pay Provisions

4.01 Employees will be reimbursed for mileage at the rate of 29 cents per mile, or the rate generally offered to other COP newsroom employees if that rate is higher than 29 cpm.

On June 13, the Respondent's general counsel, Brett Thurman, notified Union President Lou Grieco by email that the Respondent had announced to its nonunit employees a package of company "driving and parking" policy changes, effective July 1. The changes included a mileage reimbursement rate increase from 29 to 32 cents per mile and a requirement that employees in each department provide their drivers' license numbers and car license plate numbers to the Respondent. In response, Grieco emailed Thurman that day, stating that, under Article 4.01, "Guild employees should get the same" reimbursement increase as the nonunit employees. Grieco added that the Union had a "few questions and concerns" regarding the package of policy changes, but that "[w]ith a few assurances, we might be able to sign off on those items as well." Finally, Grieco wrote that "the Guild reserves the right to negotiate for a rate higher than 32 cents should we get back to the bargaining table."

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed __U.S.L.W. __ (U.S. May 27, 2009) (No. 08-1457); *Northeastern Land Services, Ltd. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), rehearing denied No. 08-1878 (May 20, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for rehearing filed Nos. 08-1162, 08-1214 (May 27, 2009).

² All dates are 2008 unless specified otherwise.

Thereafter, by email dated June 16, Thurman told Grieco that Article 4.01 was a "posted condition" establishing "a waiver of Guild rights." Thurman further stated that although such a waiver "would be binding under labor law if we had signed a contract," "[w]aivers in posted conditions are illegal" and "[w]e can't post the right to make unilateral improvements."

Grieco responded by email dated June 17, asserting that the provision was lawful because it set out specific criteria regarding the mileage increase. Grieco also notified Thurman that "we accept the company's right to enforce provision 4.01 as written and therefore we demand that the company honor the provision and apply the increase to our people."

On June 27, Thurman advised Grieco by email that the Respondent would include in its new contract offer the increased mileage rate. Grieco responded by email dated June 30 that it was still the Union's position that the Respondent should provide the mileage increase to unit employees "according to the provision of Article 4.01," and that it should be effective as of July 1, the date scheduled for the rate increase for nonunit employees. Grieco added that the Union would be willing to negotiate the other parts of the Respondent's policy as part of an overall agreement. Later that day, Thurman responded by email that the Respondent's position remained as previously stated.

By email to Thurman dated July 1, Grieco noted that "[t]oday is the day" that nonunit employees were to begin receiving the mileage increase, that the Union expected unit employees to receive the same increase under Article 4.01 effective that day, and that, if the Respondent refused to grant the increase, the Union would "proceed with Board charges." By email dated July 2, Thurman reiterated the Respondent's position that Article 4.01 involved a waiver of the Union's right to bargain over mileage rates, as it permitted the Respondent to increase and decrease mileage rates at its sole discretion, provided that the rate was at or above 29 cents per mile. Thurman stated that he was willing to discuss his proposal to give unit employees the increased reimbursement rate under the same terms as the nonunit employees, and would consider any counterproposal, but that he would "not just implement the mileage rate increase per the posted conditions."

B. The Parties' Contentions

The General Counsel contends that Article 4.01 was part of the Respondent's "last, best, and final offer" and was lawfully implemented after reaching an impasse in bargaining. According to the General Counsel, Article 4.01 clearly required the Respondent to raise unit employees' mileage reimbursement rate to 32 cents per mile

once it raised other newsroom employees' rate to that level. The General Counsel alleges that, by failing and refusing to do so, the Respondent violated Section 8(a)(5) and (1).

The Respondent argues that, by its terms, Article 4.01 grants it unfettered discretion to increase or decrease the unit employees' mileage reimbursement rate as long as that rate is not reduced below 29 cents per mile. Accordingly, the Respondent contends that raising the mileage rate for the unit employees pursuant to Article 4.01 would be unlawful under *McClatchy Newspapers*, 321 NLRB 1386, 1390 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998) (employer violated Sec. 8(a)(5) by unilaterally implementing wage increase proposal that gave employer "unlimited managerial discretion over future pay increases"). Additionally, the Respondent contends it repeatedly offered to bargain over the mileage reimbursement issue.

The Union contends, among other things, that even if Article 4.01 normally would be unlawful under *McClatchy*, the Union, in its June 17 email, clearly and unmistakably "accept[ed] the company's right to enforce provision 4.01 as written." Thus, the Union agrees with the General Counsel that the Respondent violated Section 8(a)(5) by failing and refusing to raise the reimbursement rate for the unit employees when it did so for the nonunit employees.

As explained below, we find that the Respondent violated Section 8(a)(5) and (1) of the Act when it failed and refused to adhere to Article 4.01 by failing to raise the mileage reimbursement rate for unit employees to 32 cents per mile.

C. Discussion

It is well settled that "after bargaining to an impasse...an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals." CalMat Co., 331 NLRB 1084, 1097 (2000), quoting Taft Broadcasting Co., 163 NLRB 475, 478 (1967), review denied Television Artists AFTRA v. NLRB, 395 F.2d 622, 624 (D.C. Cir. 1968). Once those changes are lawfully implemented, they become terms and conditions of employment that the employer may not unilaterally change without first bargaining with the union to impasse. See

³ The Respondent also cites in support *KSM Industries*, 336 NLRB 133, 135 (2001), reconsideration granted in part 337 NLRB 987 (2002) (health insurance proposal unlawful under *McClatchy* because it "left no room for bargaining between the Union and the Respondent about the manner, method and means of providing" that particular term), and *Quick Tire*, 340 NLRB 301, 302 (2003) (discretionary wage plan unlawful under *McClatchy* because it stated that "the Company *may* continue its current pay practices") (emphasis in original decision).

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NLRB v. Katz, 369 U.S. 736, 745 (1962); Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964). However, even after reaching a lawful impasse, an employer may not unilaterally implement certain types of proposals that grant the employer "broad discretionary powers that necessarily entail recurring unilateral decisions regarding changes in" certain types of terms and conditions of employment. McClatchy, supra at 1388.

In this case, all parties agree that the Respondent and the Union reached a valid impasse and that the Respondent subsequently implemented its last, best, and final offer, which included Article 4.01. Neither the General Counsel nor the Union claims that this unilateral implementation was unlawful. In fact, they argue, and we find, that after implementation, Article 4.01 became the extant mileage reimbursement policy.

It is undisputed that the Respondent failed and refused to adhere to the terms of Article 4.01 when it raised the mileage reimbursement rate of its nonunit employees from 29 cents to 32 cents without simultaneously raising the rate for the unit employees. The Respondent's refusal to raise the rate constituted a unilateral change to the reimbursement policy, in violation of the rule set forth in *Katz*, supra.

The Respondent asserts, as a defense, that raising the unit employees' reimbursement rate under Article 4.01 would have subjected it to liability under McClatchy. In the particular circumstances of this case, we find this assertion unavailing. As noted above, it is undisputed that Article 4.01 was implemented on January 1. There is no complaint allegation that this implementation was unlawful. Indeed, the Union never contended that the implementation would violate McClatchy principles. To the contrary, the Union explicitly conveyed its acceptance of the provision as a lawfully implemented term and condition of employment. Having thus waived any claim that the Respondent's implementation was unlawful under McClatchy, the Union would be estopped from thereafter raising a McClatchy claim in response to any measure taken in conformance with the requirements of Article 4.01.4 Accordingly, we find that the Respondent may not rely on McClatchy as a justification for its unilateral change to the terms and conditions of employment that were established by Article 4.01.

Accordingly, we find that by failing and refusing to raise the mileage reimbursement for its unit employees effective July 1, the date on which it increased the mileage reimbursement for its nonunit employees, the Respondent violated Section 8(a)(5) and (1) of the Act as alleged.

CONCLUSIONS OF LAW

- 1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time editorial department employees of [Respondent], and all other individuals who perform work for the editorial department of [Respondent] on part or all of a minimum of 15 days in any calendar quarter, excluding all other employees represented by other labor organizations, and all professional employees, guards and supervisors as defined in the Act. This recognition includes the Universal Copy Desk and editorial department employees whose primary work is content provision, page design, or editing for Dayton Daily News and/or associated websites. These positions are excluded from the bargaining unit: Editor in chief, managing editors, assistant managing editors, metro editor, assistant metro editors, regional editors, online editorial director, online editorial managers, nation/world editor, lifestyles editors, art editor, sports editor, business editor, editorial page editor, news desk editors, events editor, and chief of photogra-

4. The Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to increase the mileage reimbursement for unit employees to the rate of 32 cents per mile, the rate generally offered to nonunit newsroom employees.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, it shall be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act. We shall order the Respondent to raise the unit employees' mileage reimbursement to the rate of 32 cents per mile, and to give this rate effect retroactive to July 1, 2008. We shall also order the Respondent to make its unit employees whole for any loss of benefits suffered as a result of its

⁴ In the absence of any complaint allegation here that the Respondent violated Sec. 8(a)(5) when it implemented Art. 4.01 upon reaching an impasse in bargaining with the Union, we find it unnecessary to consider whether implementation of Art. 4.01 would constitute a *McClatchy* violation in other circumstances.

We also find unavailing the Respondent's contention that it offered to bargain with the Union over its refusal to adhere to Art. 4.01. Any such offer to bargain would not permit the Respondent to thereafter unilaterally change the reimbursement policy absent reaching agreement or impasse.

failure to apply the provision, in accordance with the Board's decision in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁵

ORDER

The Respondent, Dayton Newspapers, Inc., d/b/a Cox Ohio Publishing, Dayton, Ohio, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Failing and refusing to increase the mileage reimbursement rate for unit employees to the rate of 32 cents per mile, the rate generally offered to nonunit newsroom employees.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Increase the mileage reimbursement rate for unit employees to the rate of 32 cents per mile, retroactive to July 1, 2008, as set forth in the remedy section of this decision, and make whole its unit employees for any losses they may have suffered due to its unilateral change in the manner set forth in the remedy section of this decision
- (b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all records, including an electronic copy of records if stored in electronic form, necessary to analyze the amount of mileage reimbursement owed unit employees under the terms of this Order.
- (c) Within 14 days after service by the Region, post at its facility in Dayton, Ohio, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or

⁵ The General Counsel seeks compound interest computed on a quarterly basis for any monetary awards. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Glen Rock Ham*, 352 NLRB 516 fn. 1 (2008), citing *Rogers Corp.*, 344 NLRB 504 (2005).

covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2008.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 5, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to increase the mileage reimbursement rate for you to the rate of 32 cents per mile, the rate generally offered to nonunit newsroom employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL increase your mileage reimbursement rate to the rate of 32 cents per mile, retroactive to July 1, 2008, and WE WILL make you whole for any loss you may have suffered, with interest, due to our failure to increase the mileage reimbursement rate.

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⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."